82-1375

NO.

In the Supreme Court of the United States

OCTOBER TERM 1982

RICHARD HOWARD EHLINGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CHARLES O. FARRAR, JR., ESQUIRE
Counsel of Record
G. BARTRAM BILLBROUGH, JR., ESQUIRE

LYONS AND FARRAR, P. A.
201 Alhambra Circle, Suite 1200
Coral Gables, Florida 33134
Telephone: (305) 444-1599
Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

1. Whether a defendant's right to due process of law and fundamental fairness is violated when he is found guilty of participation in a narcotics conspiracy and his conviction is affirmed by an appellate court where the prosecutor argued that suppressed evidence not introduced at trial belonged to the defendant and indicated the defendant's guilt.

LIST OF INTERESTED PERSONS

The only persons having an interest in this case are the Petitioner, his family, and the United States of America.

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TABLE OF AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM 1982

RICHARD HOWARD EHLINGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, RICHARD HOWARD EHLINGER, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on September 23, 1982, and December 15, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix attached hereto, but was not reported in the official reporters. The Court of Appeals denied the petition for rehearing on December 15, 1982, which is also reproduced in the Appendix. The District Court did not render any written opinions specifically directed to this case.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered September 23, 1982. The appellate court denied the petition for rehearing on December 15, 1982. The appellate court then entered an order staying issuance of the mandate pending the timely filing of a certiorari petition and disposition thereof by this Court. The petition is filed within the authorized time period. Jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment V:

No person shall . . . be deprived of life, liberty, or property without due process of law . . .

Title 21 U.S.C. §841:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

Title 21 U.S.C. §846:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

RICHARD HOWARD EHLINGER and five other individuals not parties to this proceeding, Eugene Fox, Gerald Todd, Carl Leslie, Michael Moore, and Walter Wickert, were charged in a two-count indictment dated January 26, 1981, of conspiring to intentionally and knowingly possess with intent to distribute a quantity of a scheduled I controlled substance, to-wit: marijuana (Count I), and for knowingly and intentionally possessing with intent to distribute a controlled substance, to-wit: approximately 1,611 pounds of marijuana (Count II) arising out of an incident which took place on or about January 9, 1981. On May 13, 1981, the jury found RICHARD HOWARD EHLINGER guilty of Counts I and II of the indictment.

The government's investigation of this case began on January 9, 1981, at approximately 3:30 p.m. when special agents Edward Eledge and William Penny of the Drug Enforcement Administration (DEA), went to 2311 S.W. 66th Terrace, Ft. Lauderdale, Florida, where they met with co-defendant Todd and a confidential informant. Eledge and the confidential informant went to Todd's Winnebago, where Todd informed the special agent that a new load consisting of 28,000 pounds of marijuana was available. Negotiations then began in which a minimum purchase of 18 tons was discussed. During these negotiations, Todd told Eledge that 7 bales of wet marijuana were in a tractor-trailer elsewhere on the property.

Approximately an hour later, a Cadillac being driven by co-defendant Fox entered the area. RICHARD HOWARD EHLINGER was a passenger in that vehicle.

Both EHLINGER and Fox entered the Winnebago and met with Todd, Eledge, and the confidential informant. At that time, Fox discussed the sale of 28,000 pounds of marijuana for a purchase price of $200.00 per pound.

According to special agent Eledge, Fox and EHLINGER then left the Winnebago, and went to a trailer. Approximately 5 to 10 minutes later, the Cadillac returned. He said that he observed EHLINGER at the Cadillac making calculations on what appeared to be a hand calculator.

Fox and EHLINGER then returned to the Winnebago. EHLINGER, according to the special agent, had the calculator tape and a spiral notebook in his possession. Once Fox and EHLINGER returned to the trailer, Eledge was informed that the 7 bails of marijuana located on the trailer were available for sale. Special agent Eledge then agreed that he would pay for each bale upon their arrival. Todd, Fox and Eledge then left the Winnebago without EHLINGER and proceeded to the trailer to look at the marijuana on board. While at the trailer, Fox discussed future deliveries of marijuana with the special agent.

At approximately 5:00 p.m., a white van being driven by co-defendants Moore and Leslie arrived at the scene. Fox pulled back the tarp on the van and cut open one of the bales of marijuana with a knife that had been given to him by Todd. Fox then instructed Leslie and Moore to take the keys to Eledge's van so that another load could be obtained.

Special agent Penny testified that after Leslie and Moore arrived with a van filled with marijuana, EHLINGER drove the van back to the trailer. The special agent admitted, however, that someone told EHLINGER to drive the van and he believed it was special agent Eledge. The special agent also testified that EHLINGER off loaded only a few bales and complained of back problems which precluded him from doing anything else. EHLINGER was supposed to have taken out a list that contained bale numbers and weights and checked the bales off the list as they were placed in the trailer.

After a pre-arranged signal, the arrest of Todd, Fox, and EHLINGER took place. When Leslie and Moore returned in Eledge's white van with a second load of marijuana at approximately 7:00 p.m., they were also arrested.

Prior to trial, RICHARD HOWARD EHLINGER filed a motion to suppress evidence seized from his briefcase. The trial court granted this motion and excluded all evidence concerning the briefcase's contents.

At trial, Penny testified that he found the inventory list during a search of EHLINGER which occurred at least five minutes after EHLINGER had been out of Penny's view. On cross-examination, however, Penny admitted that shortly after the arrest of EHLINGER the sheet of paper was reported to have been found "elsewhere than on Mr. Ehlinger's person" in a DEA report of seizure form.

It was the contention of the defense during closing argument that the government had failed to prove beyond a reasonable doubt that the list had been found in EHLINGER's possession since the special agent had signed reports stating he had found it elsewhere. The defense also argued that the evidence established the sheet of paper could not have been found on the defendant.

In rebuttal, the government argued that "there was absolutely no contention that the container [where Penny initially reported that the list was found] did not belong to Mr. Ehlinger." No evidence had been introduced at trial that suggested the list was found in a container. Indeed, defense counsel had carefully tailored his cross-examination to establish that the list was "found elsewhere." Defense counsel immediately objected and requested a mistrial, which was denied.

On appeal to the United States Court of Appeals for the Eleventh Circuit, RICHARD HOWARD EHLINGER argued that the prosecutor's reference to excluded evidence during his closing argument was improper, prejudicial, and plain error. In addition, the defendant also argued that the prosecutor's reference also commented on the defendant's Fifth Amendment right to remain silent.

The appellate court rejected these arguments. Regarding the comment on suppressed evidence, the court held that the record demonstrated a plausible explanation for the prosecutorial comment. The court also stated that it did not believe that the prosecutor had a manifest intention to comment on the defendant's failure to testify.

REASON FOR GRANTING THE WRIT

A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS IS VIOLATED WHEN HE IS FOUND GUILTY OF PARTICIPATION IN A NARCOTICS CONSPIRACY AND HIS CONVICTION IS AFFIRMED BY AN APPELLATE COURT WHERE THE PROSECUTOR ARGUED THAT SUPPRESSED EVIDENCE NOT INTRODUCED AT TRIAL BELONGED TO THE DEFENDANT AND INDICATED THE DEFENDANT'S GUILT.

The situation presented for review to this Court demonstrates that the Eleventh Circuit has departed from previous decisions in the Fifth Circuit and its sister circuits in requiring the petitioner to establish a "manifest intention" on the part of the prosecutor in his comment on the defendant's silence, or to establish that the jury would "naturally and necessarily" view the statement as a comment on the defendant's failure to testify. The case law does not support the path taken by the Eleventh Circuit and thus requires that this Court grant the Writ of Certiorari to review these new developments.

The law has traditionally been well settled that where a prosecutor makes reference to excluded evidence during closing argument, it is improper, prejudicial, and plain error, regardless of the government's case. *Garris v. United States*, 390 F.2d 862 (D.C. Cir. 1968); *United States v. Arendale*, 444 F.2d 1260 (5th Cir. 1971);

United States v. Phillips, 664 F.2d 971 (5th Cir. 1981); *United States v. Dorr*, 636 F.2d 117 (5th Cir. 1980).

The cases of *Garris v. United States*, 390 F.2d 862 (D.C. Cir. 1968), and *United States v. Arendale*, 444 F.2d 1260 (5th Cir. 1971), demonstrate the erroneous treatment of the issue presented below to the Eleventh Circuit. In *Garris*, the prosecutor in closing argument commented on inadmissible hearsay testimony. The Fifth Circuit reversed the conviction, holding that a prosecutorial attempt to strengthen his case during closing argument by way of excluded testimony constituted plain error.

In *Arendale* the prosecutor commented in rebuttal on why it had not called a certain witness which the defense counsel had raised during its closing argument. The prosecutor explained that the additional witness would have been merely cumulative, but also stated what the absent witness allegedly knew or saw concerning the crime. The appellate court reversed, holding that no one led the prosecuting attorney into referring to the excluded hearsay. Indeed, the Court found that defense counsel had avoided that very area.

In the present case, a virtually identical situation occurred. The crucial evidence against RICHARD HOWARD EHLINGER at trial was the possession of the marijuana log sheet. The government's inability to establish when or from where this sheet was obtained, according to the defense, established a reasonable doubt.

The rebuttal of the government argued for the first time that there was no contention that the container

[where the list was initially reported found] and did not belong to Mr. Ehlinger. No evidence had been introduced at the trial relating to a container. Indeed, the only container involved in the case had already been suppressed during pre-trial motions. Defense counsel during his cross-examination of the special agent avoided any discussion of containers.

Rather than apply the standards enunciated in *Garris* and *Arendale*, the Eleventh Circuit ignored precedent and applied only the rule of *Williams v Wainwright*, 673 F.2d 1182 (11th Cir. 1982), to this case. The requirement placed on the defendant to establish either a "manifest intention" of the prosecutor to comment on his silence, or to establish that the jury would naturally and necessarily consider it such a comment, is constitutionally infirm. Additionally, the Fifth Circuit's failure to address the issue of prosecutorial reference to excluded evidence denies RICHARD HOWARD EHLINGER due process of law.

It is incumbent upon this Court to review the standard announced by Eleventh Circuit with regard to prosecutorial misconduct. The decision of the Eleventh Circuit in applying its standard of review and failure to address issues raised by the petitioner denied due process of law. This Court should correct the injustice done to the person improperly caught therein.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

CHARLES O. FARRAR, JR.
Counsel of Record

G. BARTRAM BILLBROUGH, JR.

LYONS AND FARRAR, P.A.
201 Alhambra Circle
Suite 200
Coral Gables, Fla. 33134
Telephone: (305) 444-1599

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, 1982, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General, Department of Justice, Washington, D. C. 20530, and by hand to Assistant United States Attorney Bruce Zimet, 155 South Miami Avenue, Miami, Florida 33130. I further certify that all parties required to be served have been served.

CHARLES O. FARRAR, JR.

G. BARTRAM BILLBROUGH, JR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6089
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD HOWARD EHLINGER,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(September 23, 1982)

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

PER CURIAM:

Richard Howard Ehlinger appeals his conviction of possession with intent to distribute marijuana and conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §846. We have examined Ehlinger's contentions and have found them to be without merit. Therefore, we affirm his conviction.

Ehlinger contends that the trial court erred in failing to grant his motion for a judgment of acquittal on the grounds there was insufficient evidence to sustain

his conviction for conspiracy and the possession of a controlled substance. Ehlinger's contention must, however, fail. Under *Glasser u United States*, 361 U.S. 60 (1942), this court is charged with viewing the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the government. When the evidence is viewed in this manner, it is sufficient to support Ehlinger's conviction.

On January 9, 1981, special agents of the Drug Enforcement Administration sought to purchase marijuana from a group of individuals. These agents initially met with one of Ehlinger's co-defendants, Gerald Todd. It was arranged that the agents would purchase 28,000 pounds of marijuana at $250 per pound. While these negotiations were taking place, Todd made a number of phone calls. During the course of the negotiations, a Cadillac driven by one of Ehlinger's co-defendants, Eugene Fox, pulled up. Ehlinger was a passenger in the car. The appellant was present when Fox informed the agents that a load of fourteen tons of marijuana was en route. The appellant later made calculations computing the price that the agents were to pay for the marijuana. He also explained to the agents the location of seven bales of marijuana and announced that their price was $74,000.

Soon afterward, a van full of marijuana pulled up. Ehlinger, after some discussion, drove the van to a truck and helped unload the marijuana. He also conducted an inventory of the marijuana, checking the bale numbers against the weight of the individual bales.

Under these facts, the jury could have found the evidence sufficient to convict Ehlinger. Consequently, we reject Ehlinger's contentions on this point.

The appellant also argues that the trial court abused its discretion in failing to grant his motion for a continuance because of his injuries. Motions for continuance are addressed to the sound discretion of the court. This discretion is not disturbed on appeal unless there is a clear showing of abuse of discretion. *See, e.g., United States v. Nickerson*, 669 F.2d 1016 (5th Cir. 1982); *United States v. Harbin*, 601 F.2d 773 (5th Cir.), *cert. denied*, 444 U.S. 954 (1979).

The court below did not abuse its discretion. The trial judge inquired as to whether the defendant's mind was clear and he responded affirmatively. Further, when informed that the defendant could only sit for an hour without suffering pain, the trial judge announced that the trial would be in hour-long segments, followed by recesses. Neither appellant nor his counsel complained of appellant's discomfort during the trial. Nor did appellant present any evidence that the drugs he was taking affected his thinking or his ability to assist his counsel before or during trial. Thus, we find that Ehlinger's contention is meritless.

Lastly, Ehlinger contends that the trial court erred in failing to grant his motion for a mistrial due to a prosecutorial comment on his silence. Specifically, the following prosecutorial statement during closing argument is complained of:

He makes a big deal about where that came from, the saying that it was incorrect in his report. The question was, "Isn't it a fact that you submitted a report that it was found in his pocket, but it was found in a container?"

There is absolutely no contention that the container didn't belong to Mr. Ehlinger.

(Record, at 217.)

"Prosecutorial reference to the 'uncontradicted' state of evidence constitutes impermissible comment of the defendant's exercise of the right to remain silent only if: (1) the prosecutor's manifest intention was to comment on the defendant's failure to testify, or (2) the remark was such that the jury would naturally and necessarily take it to be a comment on the failure of the defendant to testify." *Williams v. Wainwright*, 673 F.2d 1182, 1184 (11th Cir. 1982). Under *Williams*, if a plausible explanation for the prosecutorial comment other than pointing out the defendant's failure to testify is present, the first part of the test is satisfied. In the instant case, the disputed remark was merely a reference to the fact that although where a certain document was found was disputed, it was undisputed that it was under Ehlinger's control. Thus, the appellant fails on the first prong of the *Williams* test.

Secondly, from examining the record, we find that the jury would not "naturally and necessarily" take the reference to be a comment on the accused's silence. Therefore, Ehlinger has failed to carry the day on the second point of the *Williams* test.

We have examined all of Ehlinger's contentions and have found them to be meritless. Consequently, the affirmation of his conviction is required.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6089
Non-Argument Calendar

D. C. Docket No. 81-6007-CR-NCR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD HOWARD EHLINGER,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

September 23, 1982

CASE NO. 82-1375

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

RICHARD HOWARD EHLINGER,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

SWORN MOTION TO ACCEPT
AS TIMELY FILED
PETITION FOR CERTIORARI
AT THE UNITED STATES
SUPREME COURT

COMES NOW, the Petitioner, RICHARD HOWARD EHLINGER, by and through his undersigned attorney, and hereby submits this Sworn Motion to Accept as Timely Filed the Petition for Certiorari in the United States Supreme Court. In support thereof, the Petitioner states:

1. On September 23, 1982, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of conviction of the United States District Court for the Southern District of Florida in this case. (Attached as Exhibit "1").

2. Thereafter, the Petitioner, RICHARD HOWARD EHLINGER, filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc in the United States Court of Appeals for the Eleventh Circuit.

3. The Petitioner had not recieved an order denying the Petition for Rehearing but did, on December 22, 1982, receive a copy of a letter dated December 15, 1982, to the Clerk of the United States District Court for the Southern District of Florida, and a copy of the judgment

of this Court issued as and for the mandate. (December 22, 1982, letter attached as Exhibit "2").

4. After receipt of the December 15, 1982, letter, the undersigned advised the Petitioner of the procedure still available to him. The Petitioner advised the undersigned that he wished to apply to the United States Supreme Court for a Writ of Certiorari and wished to seek a stay of mandate pending application for a Writ of Certiorari.

5. Indeed, the undersigned concluded that the December 15, 1982, judgment and issuance of mandate constituted the denial of Petition for Rehearing. (See Motion to Recall and Stay Issuance of Mandate and Memorandum of Law attached as Exhibit "3").

6. Using the December 15, 1982, date for computation of the time within which to file a Petition for Certiorari, the Petition was due on February 14, 1983.

7. An associate attorney employed by the undersigned, G. BARTRAM BILLBROUGH, received a telephone call approximately 4:00 p.m. on February 16, 1983, from a Clerk of the United States Supreme Court. The Clerk informed Mr. Billbrough that the Petition was not timely filed because the Motion for Rehearing was denied on November 30, 1982.

8. The undersigned and Mr. Billbrough have monitored the process of appeal in this case. Further, no denial of the Motion for Rehearing was ever received. In fact, the only document ever indicating a denial of the Motion for Rehearing was the December 15, 1982, communication from the United States Court of Appeals for the Eleventh Circuit. (See attached Affidavit, of the undersigned and Mr. Billbrough, Exhibits "4" and "5", respectively).

9. Although this Sworn Motion to Accept as Timely Filed does not strictly comply with Sup. Ct. R. 29, failure to consider the merits of this Motion would constitute a grave injustice and deny the Petitioner due process of law. The Petitioner should not be held accountable and punished by a failure by the United States Court of Appeals for the Eleventh Circuit or the United States Postal Service to communicate a copy of the Motion for Rehearing.

WHEREFORE, the Petitioner respectfully requests this Court grant his Sworn Motion to Accept as Timely Filed the Petition for Certiorari to the United States Supreme Court.

Respectfully submitted,

By: Charles O. Farrar, Jr.
CHARLES O. FARRAR, JR.
201 Alhambra Circle, Suite 1200
Coral Gables, Florida 33134
Telephone: (305) 444-1599

SWORN TO and SUBSCRIBED before this 18 day of February, 1983.

Lynn Anderson
NOTARY PUBLIC, STATE OF FLORIDA

My Commission Expires:
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT 23 1983
BONDED THRU GENERAL INS. UNDERWRITERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/hand delivered to Bruce Zimet, Esq., Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130, Solicitor General, Department of Justice, Washington, D.C. 20530, this 22nd day of February, 1983.

By: Charles O. Farrar, Jr.
CHARLES O. FARRAR, JR.

cc: Richard Ehlinger

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-6089
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD HOWARD EHLINGER,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(September 23, 1982)

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

PER CURIAM:

Richard Howard Ehlinger appeals his conviction of possession with intent to distribute marijuana and conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. § 846. We have examined Ehlinger's contentions and have found them to be without merit. Therefore, we affirm his conviction.

Ehlinger contends that the trial court erred in failing to grant his motion for a judgment of acquittal on the grounds that there was insufficient evidence to sustain his conviction for conspiracy and the possession of a controlled substance. Ehlinger's contention must, however, fail. Under Glasser v. United States, 361 U.S. 60 (1942), this court is charged with viewing the evidence and all inferences that may reasonably be drawn from it

in the light most favorable to the government. When the evidence is viewed in this manner, it is sufficient to support Ehlinger's conviction.

On January 9, 1981, special agents of the Drug Enforcement Administration sought to purchase marijuana from a group of individuals. These agents initially met with one of Ehlinger's co-defendants, Gerald Todd. It was arranged that the agents would purchase 28,000 pounds of marijuana at $250 per pound. While these negotiations were taking place, Todd made a number of phone calls. During the course of the negotiations, a Cadillac driven by one of Ehlinger's co-defendants, Eugene Fox, pulled up. Ehlinger was a passenger in the car. The appellant was present when Fox informed the agents that a load of fourteen tons of marijuana was en route. The appellant later made calculations computing the price that the agents were to pay for the marijuana. He also explained to the agents the location of seven bales of marijuana and announced that their price was $74,000.

Soon afterward, a van full of marijuana pulled up. Ehlinger, after some discussion, drove the van to a truck and helped unload the marijuana. He also conducted an inventory of the marijuana, checking the bale numbers against the weight of the individual bales.

Under these facts, the jury could have found the evidence sufficient to convict Ehlinger. Consequently, we reject Ehlinger's contentions on this point.

The appellant also argues that the trial court abused its discretion in failing to grant his motion for a continuance because of his injuries. Motions for continuance are addressed to the sound discretion of the

court. This discretion is not disturbed on appeal unless there is a clear showing of abuse of discretion. See, e.g., United States v. Nickerson, 669 F.2d 1016 (5th Cir. 1982); United States v. Harbin, 601 F.2d 773 (5th Cir.), cert. denied, 444 U.S. 954 (1979).

The court below did not abuse its discretion. The trial judge inquired as to whether the defendant's mind was clear and he responded affirmatively. Further, when informed that the defendant could only sit for an hour without suffering pain, the trial judge announced that the trial would be in hour-long segments, followed by recesses. Neither appellant nor his counsel complained of appellant's discomfort during the trial. Nor did appellant present any evidence that the drugs he was taking affected his thinking or his ability to assist his counsel before or during trial. Thus, we find that Ehlinger's contention is meritless.

Lastly, Ehlinger contends that the trial court erred in failing to grant his motion for mistrial due to a prosecutorial comment on his silence. Specifically, the following prosecutorial statement during closing argument is complained of:

> He makes a big deal about where that came from, the saying that it was incorrect in his report. The question was, "Isn't it a fact that you submitted a report that it was found in his pocket, but it was found in a container?"
>
> There is absolutely no contention that the container didn't belong to Mr. Ehlinger.

(Record, at 217.)

"Prosecutorial reference to the 'uncontradicted' state of evidence constitutes impermissible comment of the defendant's exercise of the right to remain silent

only if: (1) the prosecutor's manifest intention was to comment on the defendant's failure to testify, or (2) the remark was such that the jury would naturally and necessarily take it to be a comment on the failure of the defendant to testify." Williams v. Wainwright, 673 F.2d 1182, 1184 (11th Cir. 1982). Under Williams, if a plausible explanation for the prosecutorial comment other than pointing out the defendant's failure to testify is present, the first part of the test is satisfied. In the instant case, the disputed remark was merely a reference to the fact that although where a certain document was found was disputed, it was undisputed that it was under Ehlinger's control. Thus, the appellant fails on the first prong of the Williams test.

Secondly, from examining the record, we find that the jury would not "naturally and necessarily" take the reference to be a comment on the accused's silence. Therefore, Ehlinger has failed to carry the day on the second point of the Williams test.

We have examined all of Ehlinger's contentions and have found them to be meritless. Consequently, the affirmation of his conviction is required.

AFFIRMED.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK

NORMAN E. ZOLLER
CLERK

December 15, 1982

TEL. 404-331-6187
FTS-242-6187
56 FORSYTH ST. N.W.
ATLANTA, GEORGIA 30303

Clerk, U. S. District Court
Southern District of Florida
Ft. Lauderdale Division

RE: 81-6007-Cr-NCR
USA -v- RICHARD HOWARD EHLINGER

APPEAL NO. 81-6089

(✓) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 25 Decision in the above case issued as and for the mandate.

Enclosed herewith are the following additional documents:

(✓) Copy of the Court's opinion. (Non published)

(✓) Original record on appeal or review. (3 vol.)

(✓) Original exhibits. (1 envelope)

( ) Bill of Costs approved by this Court.

( ) Note: The record, exhibits, etc. are out to the writing Judge, and will be returned at a later date.

Please acknowledge receipt.

Sincerely,

NORMAN E. ZOLLER, Clerk

BY: Wm L Sanders
Deputy Clerk
Wm. L. Sanders

MDT-1

CC: Charles O. Farrar, Atty. ✓
1401 Brickell Ave. #900
Miami, Fl. 33131

Bruce Zimet, AUSA/Miami

Exhibit "2"

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

COPY

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
DEC 15 1982
NORMAN E. ZOLLER
CLERK

No. 81-6089
Non-Argument Calendar

D.C. Docket No. 81-6007-CR-NCR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD HOWARD EHLINGER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

September 23, 1982

ISSUED AS MANDATE: DEC 15 1982

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 81-6089

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee,	:	
vs.	:	MOTION TO RECALL AND STAY ISSUANCE OF MANDATE AND MEMORANDUM OF LAW
RICHARD HOWARD EHLINGER,	:	
Defendant-Appellant.	:	

COMES NOW the Appellant, Richard Howard Ehlinger, by and through his undersigned attorney, and moves this Honorable Court to recall the issuance of the mandate in this cause and in support thereof states:

1. On September 23, 1982, this Honorable Court affirmed the judgment of conviction of the United States District Court for the Southern District of Florida (attached as Exhibit No. 1).

2. Thereafter Appellant filed a timely Petition for Rehearing and suggestion for rehearing en banc.

3. Appellant has not received an order denying the Petition for Rehearing but did, on December 22, 1982, receive a copy of letter dated December 15, 1982, to the Clerk of the United States District Court for the Southern District of Florida, and a copy of the judgment of this Court in the case issued as and for the mandate (December 22, 1982, letter attached as Exhibit No. 2).

4. After receipt of this Court's letter dated December 15th and received December 22, 1982, the undersigned advised the Appellant of the procedures still available to him.

Exhibit "3"

5. Appellant advised the undersigned that he wished to apply to the Supreme Court for a writ of certiorari and wished to seek a stay of the mandate of this Court pending said application for a writ of certiorari.

6. Appellant believes that substantial questions are to be presented to the Supreme Court, to wit:

A. DID THE TRIAL COURT ERR IN FAILING TO GRANT THE APPELLANT'S MOTION FOR MISTRIAL DUE TO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS WHEN THE PROSECUTOR ARGUED THAT EVIDENCE, SUPPRESSED BEFORE THE TRIAL AND NOT INTRODUCED, BELONGED TO THE DEFENDANT?

B. DID THE PANEL ERR IN FINDING NO ABUSE OF DISCRETION WHERE THE TRIAL COURT DENIED THE DEFENDANT'S MOTION FOR CONTINUANCE AFTER THE DEFENDANT INDICATED HE WAS UNDER THE INFLUENCE OF DRUGS?

Further, Appellant does not believe that the application is frivolous nor does he seek it for purposes of delay.

7. It is respectfully suggested that a recall of the mandate is required to prevent injustice.

MEMORANDUM OF LAW

8. Rule 41(a), F.R.A.P., provides in pertinent part that:

> "If the petition [for rehearing] is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order."

9. Rule 41(b), F.R.A.P., provides that:

> "A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion . . ."

10. Since the Appellant has not received a copy of this Court's order denying this petition for rehearing, and since the mandate of this Court was issued on December 15, 1982, a stay cannot be issued unless the mandate is recalled.

11. It is well recognized that this Court may recall its mandate to prevent injustice. Gradsky v. United States, 376 F.2d 993 (5th Cir. 1967). Rule 27(c), United States Court of Appeals for the Eleventh Circuit.

CONCLUSION

WHEREFORE, the Appellant respectfully requests that the mandate previously issued in this cause be recalled and stayed pursuant to Rule 41, F.R.A.P.

Respectfully submitted,

LYONS AND FARRAR, P.A.
Attorneys for Defendant-Appellant
P. O. Box 144154
Coral Gables, Florida 33114-4154
(305) 444-1599

By: _____ for
CHARLES O. FARRAR, JR.

CERTIFICATE OF INTERESTED PARTIES

It is hereby certified that the United States and Richard Howard Ehlinger are those parties having an interest in the outcome of this case.

_____ for
CHARLES O. FARRAR, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Recall and Stay Issuance of Mandate and Memorandum of Law was served by mail this 4th day of January, 1983, upon Bruce Zimet, Assistant United States Attorney, 299 E. Broward Blvd., Ft. Lauderdale, Florida.

CHARLES O. FARRAR, JR.

CASE NO. 82-1375

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

RICHARD HOWARD EHLINGER,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF
CHARLES O. FARRAR

I, CHARLES O. FARRAR, JR., after being first duly sworn, do hereby depose and state:

1. I have been the attorney of record throughout the appellate process of United States v. Richard Howard Ehlinger.

2. I have continually monitored the progress and status of the appellate process in this case throughout the entire period.

3. The only documentation ever received by my office has been a September 23, 1982, affirmance of the Judgment of Conviction of Richard Howard Ehlinger and the December 15, 1982, Judgment of Affirmance and Issuance of Mandate.

4. No formal documentation was ever received by myself or my office informing Richard Howard Ehlinger that his Motion for Rehearing had been denied.

5. The only conclusion that I reasonably could draw was that the December 15, 1982, Issuance of Mandate and Judgment of Affirmance constituted the denial of the Motion for Rehearing.

6. Using the December 15, 1982, date to compute the time for filing the Petition for Writ of Certiorari, the date due was February 14, 1983.

7. The Petition for Certiorari was otherwise filed in compliance with the Court's rules.

FURTHER AFFIANT SAYETH NOT.

Charles O. Farrar

CHARLES O. FARRAR, JR.

SWORN TO and SUBSCRIBED before me this 18 day of February, 1983.

Louise Andrews

NOTARY PUBLIC, STATE OF FLORIDA

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT 23 1983
BONDED THRU GENERAL INS. UNDERWRITERS

CASE NO. 82-1375

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RICHARD HOWARD EHLINGER,

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versus

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Respondent.

AFFIDAVIT OF
G. BARTRAM BILLBROUGH

I, G. BARTRAM BILLBROUGH, JR., after being first duly sworn, do hereby depose and state:

1. I am employed by the law firm of LYONS AND FARRAR, P.A., and have been so employed since February of 1981.

2. During the time employed by LYONS AND FARRAR, P.A., I have monitored the status and progress of the appellate cases of the Petitioner, RICHARD HOWARD EHLINGER.

3. I have never received nor have I ever seen a denial of Richard Howard Ehlinger's Motion for Rehearing and Suggestion for Rehearing En Banc, dated November 30, 1982.

4. The only correspondence ever received regarding a denial on the Motion for Rehearing and Suggestion for Rehearing En Banc was a December 15, 1982, order affirming RICHARD HOWARD EHLINGER'S conviction and issuance of mandate.

5. No further documentation has been received with regard to the status of RICHARD HOWARD EHLINGER's Motion for Rehearing or Suggestion for Rehearing En Banc.

Exhibit "5"

6. The only conclusion drawn from the documents received was that the Motion for Rehearing and Suggestion for Rehearing En Banc was denied on December 15, 1982.

7. I received a call from the United States Supreme Court Clerk's office on February 16, 1983, stating that the Motion for Rehearing was denied on November 30, 1982. This was the first time that I or anyone in my office learned of such a date or document.

FURTHER AFFIANT SAYETH NOT.

G. BARTRAM BILLBROUGH, JR.

SWORN and SUBSCRIBED before me this 18th day of February, 1983.

NOTARY PUBLIC, STATE OF FLORIDA

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT 23 1985
BONDED THRU GENERAL INS. UNDERWRITERS